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# SYMPOSIUM

## Foreword

### Thurgood Marshall: Courageous Advocate, Compassionate Judge

SUSAN LOW BLOCH\*

Thurgood Marshall's life has spanned virtually the entire twentieth century, allowing him to witness its worst and its best. When he was born in 1908, segregation was legal and pervasive, and racial hatred extreme; in the year of his birth alone, eighty-nine black men were lynched.<sup>1</sup> A grandson of slaves on both sides of his family, Marshall knew, from an early age, both the ugliness and the tenacity of racism. Determined to fight it, Marshall disregarded the difficulties and the dangers, and spent his life battling discrimination, earning the nickname "Mr. Civil Rights." His efforts, coupled with those of others in the NAACP, were largely responsible for moving this country from a segregated, ugly society toward one that is better, albeit—as the recent Rodney King events remind us—far from perfect.

As the articles in this symposium make clear, from his early college sit-down in the "whites only" orchestra section of the movies (eschewing the "nigger heaven" balcony) to his final passionate dissent on the Supreme Court, Marshall consistently championed the underdog and fought for justice. His contributions are enormous. As President Lyndon Johnson noted when he nominated him for the Supreme Court, Marshall would be a legend even if he had never sat on the Court.<sup>2</sup> His efforts to outlaw segregation and fight for equality are undoubtedly among the most important accomplishments in this century.

Once on the Court—when "Mr. Civil Rights" became "Mr. Justice"—Marshall continued his fight for justice. He continually reminded his fellow Justices they were not simply deciding arcane academic questions; these were *real* disputes affecting *real* people. He made his colleagues aware of the facts

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1. ALLEN DAY GRIMSHAW, *RACIAL VIOLENCE IN THE UNITED STATES* 58 (1969).

2. On Marshall's nomination, President Johnson said, "I believe he has already earned his place in history, but I think it will be greatly enhanced by his service on the Court." Roy Reed, *Marshall Named for High Court, Its First Negro*, N.Y. TIMES, June 14, 1967, at A1, 32. As Judge Ralph Winter, a former Marshall clerk, has noted, by the time Marshall became a judge, he had been "chased by gangs, received by Presidents (eagerly and not so eagerly), and had his picture on the cover of *Time* magazine." Ralph K. Winter, *TM's Legacy*, 101 YALE L.J. 25, 26 (1991).

they chose to ignore, as well as those they never learned. As Justice White recently noted:

Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experiences.<sup>3</sup>

Consider, for example, Marshall's angry dissent in *United States v. Kras*,<sup>4</sup> when the majority held that a mandatory fifty dollar fee to file for bankruptcy was constitutional.<sup>5</sup> A poor person, the majority assumed, could simply pay the fee in weekly installments. Marshall chastised the majority for failing to understand "how close to the margin of survival" many poor people are.<sup>6</sup> "The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity."<sup>7</sup> Angry with the majority's callous ignorance, Marshall concluded: "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."<sup>8</sup>

Marshall's ability to introduce the real world of the poor and oppressed into the Supreme Court conference room is not new information. He has frequently been highly praised for this contribution.<sup>9</sup> But Justice Marshall did more than merely give a voice to unheard masses; he proposed ways of analyzing cases that would actually make it harder for judges to hide behind sterile formalisms, and would instead force their focus onto the realities of the cases and the real people behind them. This contribution can be seen in numerous areas of the law and, in fact, is well illustrated by many of the articles in this symposium.

In the field of equal protection, for example, Marshall criticized the rigidity of the Court's formalistic analysis. Under the majority's approach, one asked first whether a statute affected a suspect classification or a fundamental right; if it did, it was subjected to "strict scrutiny," which almost always

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3. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992). See also William J. Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 394 (1981).

4. 409 U.S. 434 (1973).

5. *Id.* at 446.

6. *Id.* at 459-60 (Marshall, J., dissenting).

7. *Id.* at 460.

8. *Id.*

9. For other articles celebrating this role see, for example, Brennan, *supra* note 3, at 393; Kathleen M. Sullivan, *The Candor of Justice Marshall*, 6 HARV. BLACKLETTER J. 83 (1989); Karen Hastie Williams, *Humanizing the Legal Process: The Legacy of Thurgood Marshall*, 6 HARV. BLACKLETTER J. 90 (1989).

meant that it would be found unconstitutional.<sup>10</sup> If, however, a statute fell outside that narrow categorization, it would be upheld if it was rational—and virtually everything was found rational.<sup>11</sup> Marshall proposed a more flexible approach under which courts would examine the importance of the rights that were affected by the statute and the likely political strength of the affected group.<sup>12</sup> The more important the interests and the more insular and unpopular the affected group, the closer the scrutiny and the more justification the Court should demand. Marshall's approach was a more realistic "sliding scale," instead of a rigid, all-or-none categorization. While Marshall was never able to get a majority of the Court to explicitly adopt his proposal, his persistent criticism ultimately prodded the Court to apply their approach more flexibly.<sup>13</sup>

Similarly, in the area of the regulation of immigration and aliens, Justice Marshall rejected the Court's simplistic view that Congress's power over aliens was plenary and thus permitted arbitrary, invidious discriminations. In *Fiallo v. Bell*,<sup>14</sup> for example, the Court had to rule on the constitutionality of Congress's denying illegitimate children the right to be reunited with their fathers in this country, while granting that right both to legitimate children and to illegitimate children and their mothers.<sup>15</sup> In effect, the statute denied a traditionally disfavored group of parents and children the fundamental right to be able to live together. Notwithstanding this, the majority upheld the legislation with virtually no scrutiny. It did so because, it said, there is "limited . . . judicial inquiry into immigration legislation."<sup>16</sup> The majority tried to pretend that this legislation did not give rights to United States citizens to be reunited with their family but was only extending a privilege to aliens to enter the country.<sup>17</sup> Marshall deftly pointed out the incongruity

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10. See, e.g., *Shapiro v. Thompson*, 349 U.S. 618 (1969) (striking as violative of the fundamental right to travel a statute denying welfare assistance to residents of state who have not resided within jurisdiction for a least one year); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (holding unconstitutional the exclusion of blacks from jury service).

11. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (using rational relation test to uphold New York statute prohibiting as distractions advertisements on vehicles).

12. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting) (statute setting different ages at which men and women could buy beer violates Equal Protection clause because gender based classifications did not serve important government interest); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466-69 (1988) (Marshall, J., dissenting) (statute prohibiting group homes for the mentally retarded invalid under heightened scrutiny because not narrowly tailored to serve city's asserted interest).

13. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-47 (1985).

14. 430 U.S. 787 (1977).

15. *Id.* at 789.

16. *Id.* at 792.

17. The majority's approach in *Fiallo* was typical of its general approach in the area of immigration. See, e.g., T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J.

and absurdity of such a distinction:

[Congress's] focus was on citizens and their need for relief from the hardships occasioned by the immigration laws. The right to seek such relief was given only to the citizen, not the alien. . . . If the citizen does not petition the Attorney General for the special "immediate relative" status for his parent or child, the alien, despite his relationship, can receive no preference. . . . It is irrelevant that aliens have no constitutional right to immigrate and that Americans have no constitutional right to compel the admission of their families. The essential fact here is that Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens. When Congress draws such lines among citizens, the Constitution requires that the decision comport with Fifth Amendment principles of equal protection and due process. The simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgement of citizens' fundamental interests.<sup>18</sup>

In the esoteric area of justiciability as well, Marshall was able to pierce potentially obfuscating doctrine and get to the heart of the matter. When Gary Gilmore was about to be executed and his mother sought to enjoin the execution so that the constitutionality of the state law imposing the death penalty could be assessed, the Court held, in a quintessential example of formalistic, callous doctrine, that his mother had no standing to object to the execution of her son.<sup>19</sup> Marshall, joined by Brennan, Blackmun, and White, was appropriately appalled. In Marshall's view, no one could grant the state the power to execute unconstitutionally.<sup>20</sup> Thus, even if Gilmore were competent to waive his right to challenge the constitutionality of the statute, he could not consent to his own execution and his mother, clearly injured by the impending execution of her son, would have standing to challenge its constitutionality. The majority's willingness to let Gilmore be executed under a potentially unconstitutional statute—and he was executed—on the ground that his mother did not have standing, is a shocking example of legal formalism at its worst.

Similarly, as Professor Minow points out well in her article in this issue, Marshall also had a sophisticated, realistic view of personal choice.<sup>21</sup> His conception was not the simplistic all-or-none proposition that the majority of

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INT'L. L. 862, 868-69 (1989) (criticizing the Court's limited scrutiny of substantive immigration decisions).

18. *Fiallo*, 430 U.S. at 806-07 (Marshall, J., dissenting).

19. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976).

20. *Id.* at 1019 (Marshall, J., dissenting).

21. Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2107-08 (1992).

the Court generally employs. Unlike his brethren, Marshall recognized the importance of context and constraints:

[Marshall] illuminated the way that all choices arise within constraints, but the constraints vary, and thereby alter the range of choices. He paid particular attention to the specific costs people would bear if they exercised a choice, and used this to hold powerful figures, such as public officials, accountable when they claimed that a private individual had a choice to avoid their force.<sup>22</sup>

In the context of tax cases, as well, as Professor Cohen's article reveals, Justice Marshall made a substantial contribution by introducing a sense of reality into the analysis of tax laws.<sup>23</sup> Here too, Marshall rejected wooden, formal tests and replaced them with functional analyses that looked at the reality of transactions.<sup>24</sup>

Marshall's efforts to make the law more humane and accessible was, as the foregoing reveals, constant and pervasive. While he did not always succeed in convincing a majority of his colleagues to join his approach, his was a voice to be heard and reckoned with. In Justice Sandra Day O'Connor's words:

His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.<sup>25</sup>

The power of Marshall's voice and vision was all the more effective because he was never afraid to "tell it like it is"—either on the bench or off. In the midst of the national euphoric celebration of the bicentennial of the Constitution, he pointedly reminded us that the document, as originally adopted, was seriously flawed.<sup>26</sup> It had no place in it for blacks or women; in fact, the Constitution accepted and condoned slavery. But just as characteristically, Marshall noted the good side as well. The Constitution was a living document that allowed itself to be improved, and it had been. "'We the People' no longer enslave," Marshall said, "but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them . . . [T]he

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22. *Id.* at 2107.

23. Stephen B. Cohen, *Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011 (1992).

24. See, e.g., Professor Cohen's discussion of *Corn Prod. Ref. Co. v. Commissioner*, 350 U.S. 46 (1955), and *Arkansas Best v. Commissioner*, 485 U.S. 212 (1988). Cohen, *supra* note 23, at 2019-25.

25. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

26. Thurgood Marshall, *Reflections on the Bicentennial of the Constitution*, 101 HARV. L. REV. 1 (1987).

*true miracle was not the birth of the Constitution, but its life . . . .* I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.”<sup>27</sup> And he did. Both as advocate and as jurist, Thurgood Marshall believed passionately in the rule of law, and dedicated his life to advancing the rights of the poor, the unrepresented, and the downtrodden.

Equally characteristic of the Marshall voice—clear, unflinching, and persuasive—was his final opinion issued on the day he retired, an angry dissent in *Payne v. Tennessee*.<sup>28</sup> In *Payne*, the Court overruled two very recent cases in order to hold that the prosecution can introduce in death penalty cases evidence concerning the impact of the crime on the victim’s family. Marshall was outraged not only by the decision, but by the Court’s cavalier disregard of precedent and its casual willingness to overrule two cases that had just been decided in 1987 and 1989. Predicting more such attacks on precedents, Marshall angrily chastised his brethren: “Power, not reason, is the new currency of this Court’s decisionmaking.”<sup>29</sup>

It is this unique combination of conviction, candor, and courage that makes Thurgood Marshall a most compelling force. His colleague and close friend, Justice Brennan, captured Marshall’s invaluable contribution:

[Marshall added] a special voice . . . . His was a voice of authority: he spoke from first-hand knowledge of the law’s failure to fulfill its promised protections for so many Americans. It was also the voice of reason, for Justice Marshall had spent half a lifetime using the tools of legal argument to close the gap between constitutional ideal and reality. And it was a voice with an unwavering message: that the Constitution’s protection must not be denied to anyone and that the Court must give its constitutional doctrine the scope and sensitivity needed to assure that result. Justice Marshall’s voice was often persuasive, but whether or not he prevailed in a given instance, he always had an impact . . . [speaking] for those who might otherwise be forgotten.<sup>30</sup>

His voice, and its powerful echoes, will long endure.

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27. *Id.* at 5 (emphasis added).

28. 111 S. Ct. 2597, 2619 (1991) (Marshall, J., with Blackmun, J., dissenting).

29. *Id.*

30. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23-25 (1991).

On a less formal note, I cannot resist taking advantage of this forum for a moment of personal privilege.

Dear Judge:

On behalf of your former clerks and numerous other fans and admirers, I want to tell you what we think of you—in a forum in which you cannot tell us to be quiet or call us (again) “knuckleheads.”

You have been an inspiration to all of us. Your dedication to justice, your bravery and conviction, your humor and modesty have been models we strive to emulate. It is no accident that so many of your law clerks have gone into public service—our role model was irresistible. We, too, hope “we can do what we can with what we have.”<sup>31</sup> We thank you with all our hearts for the improvements you have wrought in our world and for the irreversible impact you have made on our own lives. We love you, Judge.

The Knuckleheads

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31. When Marshall announced his retirement on June 28, 1991, he was asked by a reporter how he wanted to be remembered: As a person who “did what he could with what he had,” he responded. Ruth Marcus, *Plain-Spoken Marshall Spars With Reporters*, WASH. POST, June 29, 1991, at A1, A10. See also Randall Kennedy, *Doing What You Can With What You Have: The Greatness of Justice Marshall*, 80 GEO. L.J. 2081 (1992).